

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 18-23538-rdd

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5 In the Matter of:

6

7 SEARS HOLDINGS CORPORATION,

8

9 Debtor.

10 - - - - - x

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12 United States Bankruptcy Court

13 300 Quarropas Street, Room 248

14 White Plains, NY 10601

15

16 October 6, 2020

17 11:15 AM

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21 B E F O R E :

22 HON ROBERT D. DRAIN

23 U.S. BANKRUPTCY JUDGE

24

25 ECRO: UNKNOWN

1 HEARING re Motion of the Official Committee of Unsecured
2 Creditors for an Order to Compel BMO Nesbitt Burns, Inc.,
3 HSBC Global Asset Management (UK) Limited, Legal and
4 General Investment Management Limited, Jeffries LLC, PNC
5 Bank, N.A. and Clearstream Banking AG, pursuant to
6 Bankruptcy Rule 2004 Production of Documents
7 (ECF #8438)

8
9 HEARING re Opposition of Non-Party Jefferies LLC to Motion
10 of Official Committee of Unsecured Creditors for an Order to
11 Compel Bankruptcy Rule 2004 Production of Documents
12 (related document(s)8438)(ECF #8461)

13
14 HEARING re Counter Motion to Compel Bankruptcy Rule 2004
15 Production of Documents (related document(s)8438) filed by
16 Nelson A. Boxer on behalf of PNC Financial Services
17 Group, Inc. (ECF #8462)

18
19 HEARING re Reply NON-PARTY JEFFERIES LLCS OPPOSITION
20 (related document(s)8438) filed by James P Chou on behalf of
21 Official Committee of Unsecured Creditors of Sears
22 Holdings Corporation, et al. (ECF #8475)

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25 Transcribed by: Sonya Ledanski Hyde

1 A P P E A R A N C E S :

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5 Creditors

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17 BY: BENJAMIN FRIEDMAN (TELEPHONICALLY)

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19 ALSO PRESENT TELEPHONICALLY:

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21 ENID STUART

22 DEAN CHAPMAN

23 ANDREW DEVORE

24 ALIX BROZMAN

25 TED BERKOWITZ

1 SHIRIN MAHKAMOVA
2 SEAN M. NOLAN
3 LEE J. ROHN
4 DAVID ZENSKY
5 DEAN CHAPMAN
6 JONATHAN FALXER
7 SANDEEP GUPTA
8 SANDRA OLIVERI
9 CLAUDIA SPRINGER
10 CHRISTOPHER LYNCH
11 BENJAMIN HIGGINS
12 DAWN KIRBY
13 TAMMY BENOZA
14 ERIC BROWN
15 RAQUEL FELIX
16 KAREN MIGDAL
17 CLINTON CUTLER
18 STUART GLICK
19 ANTHONY PIRRAGLIA
20 MEYER MUSCHEL
21 NEIMAN CHAIM
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1 P R O C E E D I N G S

2 THE COURT: All right. In re Sears Holdings
3 Corporation, et al.

4 MR. MARLOW: Good morning, Your Honor. My name is
5 Danielle Marlow. I'm here for the Creditors' Committee on
6 our motion to compel.

7 THE COURT: Okay. Good morning.

8 MR. FRIEDMAN: Good morning, Your Honor. This is
9 Ben Friedman on behalf of nonparty Jefferies, LLC.

10 THE COURT: Good morning.

11 MR. FRIEDMAN: Good morning.

12 MS. MARLOW: Your Honor --

13 UNIDENTIFIED SPEAKER: Good morning.

14 MS. MARLOW: -- this is Danielle Marlow. I just
15 wanted to give you a quick overview of what is still pending
16 on --

17 THE COURT: Before you continue, Ms. Marlow, is
18 there anyone else on for this? Is anyone on for PNC? No?

19 MS. MARLOW: Not that I can tell, Your Honor.

20 THE COURT: Okay. All right. I actually don't
21 see Mr. Friedman on the hearing dashboard, but you're on.
22 You've made your appearance, so --

23 MR. CHOU: Your Honor, this is James Chou of
24 Moritt Hock & Hamroff. I'm also counsel, conflicts counsel
25 for the Committee.

1 THE COURT: Okay.

2 MR. CHOU: I'm on just to participate, but Ms.
3 Marlow will be addressing the Court primarily.

4 THE COURT: Okay. So why don't you go ahead, Ms.
5 Marlow.

6 MS. MARLOW: Sure. Thank you, Your Honor.
7 Pursuant to the letter we sent to the Court, we've resolved
8 the motion with respect to Clearstream and Legal and General
9 Investment Corp. So the only parties that are still subject
10 to the motion are BMO Nesbitt Burns; HSBC Global Asset
11 Management; Jefferies, Inc.; and PNC as you noted, Your
12 Honor. BMO Nesbitt Burns and HSBC have not appeared in any
13 matter on these subpoenas. They were served as demonstrated
14 by the affidavits of service that we attached to our papers.
15 We also emailed the subpoenas to them. And when we made
16 this motion, we also mailed the motion papers to them, but
17 they have not appeared in any manner to object or otherwise
18 respond.

19 THE COURT: Could I interrupt you there?

20 MS. MARLOW: Sure.

21 THE COURT: It appears to me that if service was
22 proper, that your motion should be granted given that
23 they've never objected or sought to quash the Rule 2004(c)
24 subpoenas. But in looking at the affidavits of service, the
25 BMO Nesbitt Burns entity is defined in the subpoena and in

1 the motion as -- well, is described in the motion, excuse
2 me, and then defined as BMO Nesbitt -- as BMO Nesbitt, Inc.,
3 I-N-C. And in the affidavit of service, it says that it was
4 served on the Secretary of State of New York on BMO Nesbitt
5 Burns Corp.

6 MS. MARLOW: I believe that might just be a typo,
7 Your Honor.

8 THE COURT: Well, I don't know. I mean I have
9 some concern about that. And then, as you said, you also
10 emailed someone at BMO.com who's Simon A. Fish or Simon
11 Fish. Who is he? Who is he an employee of?

12 MS. MARLOW: The Corp. He's inside counsel.

13 THE COURT: Of BMO Nesbitt?

14 MS. MARLOW: Yes.

15 THE COURT: Okay. And the BMO Nesbitt entity that
16 was actually the subject of the subpoena?

17 MS. MARLOW: Yes, Your Honor. And we also mailed
18 the motion papers, as I noted.

19 THE COURT: To whom, though?

20 MS. MARLOW: To BMO Nesbitt, Corp.

21 THE COURT: All right. I mean that's my --

22 MS. MARLOW: You know, honestly, this is probably
23 just the service provider, you know, making a little bit of
24 a typo looking at it. It was affidavit of service. I mean
25 I think they probably just got the name a little misspelled

1 there. They're not lawyers.

2 THE COURT: Well, except if he's -- if Mr. Fish is
3 in-house with Corp., as opposed to BMO Nesbitt Burns, Inc.,
4 it may just be to someone else. So I'd like you to check
5 that before submitting an order.

6 MS. MARLOW: Sure. Absolutely, Your Honor.

7 THE COURT: Okay. And then as far as the HSBC
8 entity is concerned, the affidavit of service says it was
9 served on HSBC Global Asset Management UK, Limited, Care of
10 HSBC Securities USA. Is HSBC Securities USA an authorized
11 agent for service?

12 MS. MARLOW: So that's why they went through the
13 Secretary of State.

14 THE COURT: Well, no, this affidavit was served as
15 for HSBC Global Asset Management UK.

16 MS. MARLOW: Yes.

17 THE COURT: It's not through the Secretary of
18 State. It was hand delivery to an individual at that name
19 (indiscernible) Wu. It's a -- this is a statement in the
20 affidavit of service: "By delivering to and leaving a true
21 copy to (indiscernible) Wu personally, a person who stated
22 to be an authorized agent." I don't know if he stated he
23 was or is stated to be. Anyway, I'd like you to check that,
24 also, just to make sure that what is the basis for saying
25 that HSBC Securities, USA, which I'm assuming is who

1 (indiscernible) Wu works for, is authorized to receive
2 service for HSBC Global Asset Management UK, Limited.

3 MS. MARLOW: Sure, Your Honor. Do you want us to
4 submit a letter on these issues or how should we update you?

5 THE COURT: Well, I think when you submit the
6 orders, you should -- it probably makes sense to attach a
7 letter to the email that you would also file just detailing
8 your due diligence on that point. And then I had a similar
9 question on the email. The email is attached to Exhibit F
10 to the motion, and it's from you to marksteffensen@hsbc.com.

11 MS. MARLOW: Right.

12 THE COURT: And then who is he? Is he in-house
13 counsel for HSBC Global Asset Management UK, Limited, or,
14 you know, has he appeared in the case for them? What is his
15 -- who is he?

16 MS. MARLOW: He's in-house counsel. I'll check
17 his exact title.

18 THE COURT: Okay. But if he -- I mean the issue
19 is whether he's in-house counsel for some other HSBC entity
20 and not this one. So I have questions on both, the service
21 of both. Other than that, I agree with the motion and the
22 authorities cited in it that these two subpoenaed third
23 parties have not complied with the subpoena, nor have they
24 filed any sort of timely objection to it or motion to quash
25 and, therefore, need to be directed to comply.

1 Obviously, you want to have the order crystal
2 clear as to what they are supposed to do. And I would,
3 frankly, make it the same as what you've agreed to do with
4 regard to PNC and Jefferies or something equally specific so
5 that there could be no doubt as to their failure to comply
6 if you thereafter want to have them held in contempt.

7 MS. MARLOW: Understood, Your Honor.

8 THE COURT: Okay. All right. So why don't we
9 turn then to the other two. Since we have counsel for
10 Jefferies here, maybe we should do that one, and then turn
11 to PNC.

12 MS. MARLOW: Sure, Your Honor. Would you like me
13 to address the motion or do you have -- does Your Honor have
14 specific questions?

15 THE COURT: Well, I mean I've read the motion,
16 Jefferies' objection, and the Committee's reply. So you
17 both should assume that. I guess I did have one question,
18 which is, is it indeed the case that the Committee is
19 limiting its discovery at this point to holders or
20 transferees of \$250,000 and above in value?

21 MS. MARLOW: Yes, Your Honor. I believe in our
22 reply papers, we proposed a limitation in that regard to a
23 certain number of shares. Let me just pull that up. I
24 believe it was 2,000 or more shares, a holder -- an
25 accountholder with 2,000 or more shares of Land's End or

1 8,000 or more of Seritage rights. I mean if that will
2 resolve the motion, we're happy to make that accommodation
3 and --

4 THE COURT: Okay.

5 MS. MARLOW: -- resolve it.

6 THE COURT: And that's in the aggregate, I guess.
7 So, for example, someone got Seritage rights on day one and
8 then on day two, they got more of them and if it's in the
9 aggregate, then that would count?

10 MS. MARLOW: Yes, understood.

11 THE COURT: Okay. And are you willing to let
12 Jefferies do the due diligence on that or do you want them
13 just to provide you with -- obviously, subject to the
14 confidentiality order -- all of the transfers and then
15 you'll do your own due diligence on it fitting into those
16 categories?

17 MS. MARLOW: Well, I think their objection or
18 their contention of undue burden, not that we agree with it,
19 is providing all this information. So we're happy to let
20 them limit their production to accountholders who meet this
21 threshold, you know, so that they don't have to produce
22 additional information unnecessarily.

23 THE COURT: Okay. All right. So, again, I don't
24 know if there's anything more to say on this. But I'm happy
25 to hear from Jefferies counsel.

1 MR. FRIEDMAN: Your Honor, this is Ben Friedman
2 for Jefferies. I'll be brief since I know that Your Honor
3 has read the motion papers. But really what Jefferies was
4 concerned about was the fact that the Rule 2004 order didn't
5 specifically address them and that there could be a question
6 later on if the Committee's counsel eventually does file
7 fraudulent conveyance actions against Jefferies'
8 accountholders about why Jefferies disclosed this
9 information.

10 And so, you know, the primary concern that
11 Jefferies had with all of this was that concern, and we
12 attempted to resolve that concern with Committee's counsel
13 back in May. We even suggested that the Committee counsel
14 could come to the Court then and clarify the order and then
15 Jefferies would produce this information, you know, as soon
16 as the Court entered that order. So, you know, Jefferies is
17 a little bit puzzled about how we ended up here kind of on
18 the eve of the Committee's expiration of their statute of
19 limitations.

20 And so, Your Honor, if the Court is inclined to
21 grant the motion, Jefferies would request that the order
22 specifically address Jefferies and, in fact, order them to
23 produce this information so that there's really no question
24 later on from potential defendants in a fraudulent
25 conveyance action about why Jefferies was disclosing this

1 information.

2 THE COURT: Okay. Well, I'm happy to do that. I
3 will grant the Committee's motion, which is dated September
4 14. It seemed to me that when I got the Committee's
5 request, which was made over the Labor Day weekend for a
6 discovery conference which I reviewed on the 8th of
7 September, that Tuesday, that either Jefferies was being
8 unduly difficult or in fact just wanted a comfort order.
9 And under either scenarios, I didn't see the reason to have
10 a chambers commerce and instead said we should move ahead
11 with the motion which would result in an order one way or
12 another. I'm happy to make it a comfort order in event.
13 There's no sanction to Jefferies unless it, of course,
14 doesn't comply with the order that will be entered shortly.

15 It appears to me that it's clear that the Rule
16 2004 motion was addressed to obtaining information regarding
17 the insider transactions, as so defined, from those who have
18 knowledge of them, which would include the recipients of the
19 value of those transactions, which would include Jefferies,
20 and authorize the issuance of a subpoena in furtherance of
21 the order granting the motion.

22 The privacy concerns raised by Jefferies are
23 sufficiently addressed by the confidentiality order covering
24 discovery in respect of these matters. And the other
25 concern raised by Jefferies regarding the limitation on the

1 number of parties who it would be providing information to,
2 i.e., namely limited to the 250,000 in the aggregate is also
3 addressed by the Committee's agreement. So the order here
4 should grant the motion, state clearly that the motion and
5 the subpoena contemplated and this order contemplates
6 production by Jefferies responsive to the subpoena as
7 modified by the order. And then the order should lay out
8 the modifications, i.e., the time period that Jefferies
9 needs to take, the fact that the disclosure by Jefferies
10 will be covered by the confidentiality order, and the
11 limitation regarding the number of shares or rights outlined
12 by Sears' counsel on the record.

13 So I'll look for that order. You don't need to
14 settle it on Sidley, but you should copy -- Ms. Marlow, you
15 should copy Sidley's counsel so that he could make sure it's
16 consistent with my ruling.

17 MS. MARLOW: Will do.

18 THE COURT: All right. And then as far as --

19 MR. FRIEDMAN: Thank you.

20 THE COURT: Very well. And then as far as PNC
21 Bank is concerned, counsel for PNC still isn't on the phone,
22 correct?

23 MS. MARLOW: Correct, Your Honor, but they
24 submitted papers in response to the motion.

25 THE COURT: Right. And I've reviewed those

1 pleadings. It's clear to me that the Committee's counsel
2 did not limit its request here either in the motion or the
3 subpoena or during the meet and confer process to the
4 specific two days claimed by PNC, namely April 7, 2014, and
5 June 11, 2015, regarding the Land's End and Seritage rights
6 offering transactions, respectively.

7 The Committee has since then agreed to add just
8 two additional dates for checking, April 14 and June 18. I
9 guess, Ms. Marlow, what does that -- why would it just be
10 those two dates as opposed to a week on the end of -- you
11 know, a week between April 7 and April 14 or June 11 and
12 June 18?

13 MS. MARLOW: We would prefer a full week. Those
14 specific dates were offered in connection with the meet and
15 confer process, but really, yeah, we need each day between
16 April 7th and the 14th and each day between June 11th and
17 the 18th to capture any disbursements of the subject
18 security.

19 THE COURT: All right. And you're not looking for
20 subsequent transfers, right? You're just looking for
21 transfers from the Sears entity to these customers, correct?

22 MS. MARLOW: Correct. As we've seen the data,
23 it's not always exactly on the specific dates, any one
24 specific date. It's within about a week. That's why we
25 would like the production to be for each day between the 7th

1 and the 14th of April, 2014 with respect to Land's End and
2 each day between June 11th and June 18th, 2015 with respect
3 to Seritage.

4 THE COURT: Okay. All right. The original 2004
5 application simply referred to those transactions taking
6 place in the month of April and the month of June of 2014
7 and 2015, respectively. And I think that the Committee has
8 been reasonable in narrowing it down, at least to exclude
9 transfers or looking for transfers that couldn't have
10 happened before the closing date, which would have been
11 April 7 and June 11, respectively, for the two insider
12 transactions.

13 And it appears to me that they're also reasonable
14 in not insisting on the full rest of the month but rather
15 just one more week since it might take that long to fully
16 transfer the consideration from those insider transactions.

17 Are you limiting this one to the 250,000, the same
18 share formula that you had before in the Jefferies one?

19 MS. MARLOW: This one we preferred not to have
20 that limitation because there are -- these are generally
21 infinite accountholders, not institutions. So the
22 individual accountholders sometimes need to be aggregated in
23 light of other productions that have --

24 THE COURT: Okay.

25 MS. MARLOW: -- (indiscernible) for the same

1 accountholders. So we'd prefer not.

2 THE COURT: All right. And in any event, PNC has
3 not asked for that.

4 MS. MARLOW: No.

5 THE COURT: You would have this be subject to the
6 confidentiality order, though, I gather, correct?

7 MS. MARLOW: Yes, correct.

8 THE COURT: Okay. All right. So I will overrule
9 PNC's objection. It does not appear to me that compliance
10 with the subpoena as it will be clarified in this order is
11 unduly burdensome or unnecessary. Rather, the subpoena does
12 indeed further a legitimate purpose of the Committee, which
13 is to learn the transferees from the Sears entities or
14 through the -- ultimately, through the Sears entities of the
15 consideration in these two transactions. And any concern
16 that PNC would have with regard to confidentiality of its
17 customers' information is adequately addressed by the
18 confidentiality order in place, which will be referred to in
19 the order granting the motion.

20 So I will grant the motion. Again, the order
21 really needs to be clear as to the dates at issue and the
22 confidentiality provision. And that production needs to be
23 promptly, obviously, because you're facing a key deadline
24 here.

25 MS. MARLOW: Yes. I believe -- in the motion, we

1 asked that the production be within three days of entry of
2 the order.

3 THE COURT: Right. And I have no problem with
4 that given the length of time this has been pending and the
5 (indiscernible) with which now, at least, PNC would have to
6 identify these customers.

7 MS. MARLOW: Thank you.

8 THE COURT: So I'll look for both of those orders.
9 You should just copy counsel for PNC on the email to
10 chambers with the PNC order. But --

11 MS. MARLOW: Will do.

12 THE COURT: -- you can contact them in advance of
13 that order being signed and fill them in on the results of
14 this hearing and tell them that they'll be operating under
15 that deadline.

16 MS. MARLOW: Will do.

17 THE COURT: Okay. Very well. I think that
18 concludes the calendar for today. So hearing no one saying
19 anything to the contrary, I'm going to ring off at this
20 point.

21 MS. MARLOW: Thank you, Your Honor.

22 (Whereupon these proceedings were concluded at
23 11:42 AM)

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I N D E X

RULINGS

Page Line

Motion Granted

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing
transcript is a true and accurate record of the proceedings.



Sonya Ledanski Hyde

Veritext Legal Solutions

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Date: October 7, 2020